MORALITY IN MEDIA, INC.
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Founded 1962

August 4, 2005

Commissioner's Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: WT Docket 04-435
Amendment of the
Commission's Rules
To Facilitate the
Use of Cellular
Telephones and
Other Wireless
Devices Aboard
Airborne Aircraft

On behalf of Morality In Media, Inc. I hereby submit an original and four copies of Reply Comments in the above captioned proceeding.

Sincerely,

Paul J. McGeady
General Counsel

PJM/tp

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to	)	WT Docket No. 04-435
Facilitate the Use of Cellular Telephones And	)	
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REPLY COMMENTS OF MORALITY IN MEDIA

I. The Public Internet

Morality in Media seeks, in these Reply Comments to reply to the statement of CTIA- The Wireless Association appearing on Part IV page 17 of their Original Comments in which it claims that "The social etiquette aspect of wireless use on aircraft are not appropriate for the FCC to consider." CTIA quotes 47 USC Section 151. This is not the only section in the Communication Act relative to the FCC's authority to regulate wire and radio. To the contrary, there are many provisions in the Communications Act conferring authority on the FCC to regulate these "aspects", not the least of which is 47 USC 303 outlining the "Powers and duties of Commission".

This section, in paragraph (e) thereof, provides that the Commission shall

> "Regulate the kind of apparatus to be used with respect to its external effects..."

Section (f) provides that the FCC shall

> "Make such regulations not inconsistent with law as it may deem necessary... to carry out the provisions of this Act..."

Section (g) provides that the FCC shall

> "...Encourage...the more effective use of radio in the public interest"

Subsection (m) of this section, provides for suspension of an operator's license if he or she;

> "Has... caused, aided or abetted the violation of any provision of any act...which the commission is authorized to administer" or "Has transmitted ...signals or communications containing profane or obscene words, language, or meaning..."

Obviously, some of the external effects of cell phone porn picture and video transmissions include (1) material harmful to minors (easily observable in such a captive audience situation) and (2) intrusive invasion of the privacy of adults. (See Statement of Commissioner Copps in this proceeding on the need to hear from consumers relative to privacy concerns).

We also point out that 47 USC 303 (g) was relied on by the Commission in the Pacifica case as additional authority of the FCC to regulate obscenity and indecency "in the public interest." See 98 S. Ct. 3035 n.13).

Morality in Media contends that the FCC cannot ignore 47 USC 303 (g) and the concerns of the U.S. Government by eliminating comment or consideration of public interest requirements in deciding an issue so profound as permitting cell phones on airplanes, which will disserve the public interest in such a captive audience milieu and invade the privacy of unconsenting adults and permit so called "adult" content on such screens; "Adult" being a synonym for "indecency" or "material obscene for minors", but not adults.

Since an operator may not, under 303, transmit any "profane" material, the FCC clearly has the authority to prohibit the same ("Profanity", as now defined by the FCC). Since this is "radio" it can also prohibit indecent material for cell phones generally and (at all events) during the period 6 A.M. to 10 P.M.

II. The Right of Privacy on Public Transportation

In addition to the protection of children there is a constitutional right of privacy on public transportation (such as an airline) to be free of intrusive speech or depictions. This is proved by various United States Supreme Court cases, the first of which, is Lehman v. City of Shaker Heights, 418 U.S. 306 (1974) where it was held that there is no First Amendment violation in limiting access to public transit system political advertising for the reason (among others) of "The risk of imposing on a Captive Audience." Justice Douglas, the great protector of free speech, found himself concurring with the plurality and said:

> "A street car or bus is plainly not a park or a sidewalk...If we are to turn a bus or a streetcar into either a newspaper or a park, we take great liberties with people who because of necessity become commuters and at the same time captive viewers or listeners. In asking us to force the system to accept his message as a vindication of his constitutional rights the petitioner overlooks the constitutional rights of the commuters...He has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience. Buses are not recreational vehicles...they are a practical necessity for millions in our urban centers. I have already stated this view in my dissent in Public Utilities Commission v. Pollak...

Other Supreme Court cases have reiterated the right to be free of unwanted, and in many cases, offensive invasions of privacy of those who take public transportation, not as a matter of choice, but of necessity.

The opinion of Justice White, joined by Justice Blackman, O'Connor and Stevens in R.A.V. v. St. Paul, at 60 L.W. 4673 (1992) affirms this concept when it says at 4677 (n 13):

> "Although the First Amendment protects offensive speech...It does not require us to be subjected to such expression at all times and in all settings. We have held that such expression may be proscribed when it intrudes upon a 'captive audience".

Pointing to the 'captive audience' in Shaker Heights Justice Stevens at 60 L.W. 4682 in R.A.V. defined it as one in which the persons involved are present "as a matter of necessity not a choice". Such a definition fits air travel passengers.

Frisby v. Schultz, 56 L.W. 4785 (1988) at 4789 is to the same effect when it says:

> "The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive audience cannot avoid the objectionable speech. See Consolidated Edison Co. v. Public Service Commission of New York, 447 U.S. 530, 542; cf. Bolger v. Younger Drugs Products, 463 U.S. 60 1(1983)".

It is not a matter of "social etiquette" to protect children from indecent speech and unconsenting adults from unconstitutional violations of their privacy (even if depictions and voices are not indecent). Under constitutional precedent, such invasions of the privacy of a captive audience may be prohibited even if it is objectionable for reasons other than being offensive (Kovacs v. Cooper, 336 U.S. 77 (1949) (Comfort and Convenience) (Nuisance).

Kovacs, speaking of sound trucks, said: (336 U.S. 81 at 87).

> "The avowed and obvious purpose of these ordinances is to prohibit or minimize such sounds on or near the streets since some citizens find the noise objectionable and to some degree an interference with the business or social activities in which they are engaged or the quiet they would like to enjoy"..."The preferred position of Freedom of Speech...does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce Freedom of Speech in disregard of the rights of others would be harsh and arbitrary in itself".

Another applicable case is Ward v. Rock Against Racism, 57 L.W. 4879 (1989) where the Court, in upholding a New York City Ordinance, said at 4883:

> "Despite respondent's protestations to the contrary, it can no longer be doubted that government 'has a substantial interest in protecting its citizens from unwelcome noise' City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984) citing Kovacs v. Cooper."

See also Members of City Council v. Taxpayers for Vincent, 104 S. Ct. 2118 at 2129 stating that in Kovacs v. Cooper, 336 U.S. 77 (1949) the court rejected the notion that a city is powerless to protect its citizens from unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance.

III. Reply to Comments of Governmental Agencies

Morality In Media also files reply comments in respect to the combined comments of the Justice Department, the FBI and the Department of Homeland Security.

The Governmental Reply Comments raise many red flags, but they do not specifically suggest that, for the present, the Commission retain its prohibition. It is the position of Morality In Media that the War on Terror should mandate, now and for all time, a complete prohibition of the use of cell phones while airborne in view of the potential dangers to passengers suggested by the Governmental Comments and in light of 911 and the British experience in London and the Madrid train disaster (where cell phone technology was implicated). The FCC should consider the danger from an airborne cell phone used to set off explosives on the plane or being used to receive terrorist instructions from a ground cell phone.

Conclusion

Morality In Media urges the FCC, for all of the above and for National Security Reasons, to continue its prohibition of cell phones on airborne aircraft.

In the light of the comments filed in this proceeding by Morality In Media and the United States governmental agencies, (and the position of the FAA (expressed on 7/14/05), it would be prudent to dismiss this proceeding entirely as improvidently granted or, in the alternative, postpone it for a future docket, if and when the FAA lifts its ban. It would be incongruous if FCC approved airborne cell phones in advance of the FAA, the agency primarily concerned.

Respectfully submitted

By 
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